

DEPARTMENT OF STATE REVENUE

04-20160481.LOF

Letter of Findings Number: 04-20160481
Sales/Use Tax
For Tax Years 2013 and 2014

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Without supporting documentation, Contractor was responsible for sales tax or use tax on equipment and materials it purchased and used to perform work for improvement of realty on a "lump sum (non-time and materials)" basis.

ISSUE**I. Sales/Use Tax - Imposition.**

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-14.9; IC § 6-2.5-1-27.7; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-5-3; IC § 6-8.1-5-1; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-21](#); [45 IAC 2.2-4-26](#); Revenue Ruling 2014-03ST (December 5, 2014).

Taxpayer protests the Department's proposed assessments on sales and use tax.

STATEMENT OF FACTS

Taxpayer, an Indiana limited liability company, is in the business of construction. Taxpayer specializes in installing solar power panels and equipment for residential and commercial customers. Taxpayer and its customers agree to a single stated price ("lump sum (non-time and materials)" basis for the addition of tangible personal property to a structure or facility.

In 2015, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records and tax returns for 2013 and 2014 tax years. Pursuant to the audit, the Department assessed use tax on the grounds that Taxpayer did not pay sales tax or self-assess and remit the use tax on certain purchases of tangible personal property, which Taxpayer used to perform the installation jobs and also for its business.

Taxpayer protested the assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales/Use Tax - Imposition.**DISCUSSION**

Pursuant to the audit, the Department found that Taxpayer, as a contractor performing construction work on a lump sum (non-time and materials) basis, did not pay sales tax or self-assess and pay the use tax on its purchases of materials. Taxpayer, to the contrary, argued that its purchases were exempt from sales or use tax pursuant to IC § 6-2.5-5-3, IC § 6-2.5-3-4, and the Department's ruling.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax

is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). "Retail transaction" is "a transaction of a retail merchant that constitutes selling at retail as described in IC [§] 6-2.5-4-1 . . . or . . . in any other section of [IC 6-2.5-4](#)." IC § 6-2.5-1-2(a). A person who acquires property in a retail transaction (a "purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." Id. "The retail merchant shall collect the tax as agent for the state." Id.

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is generally functionally equivalent to the sales tax. See Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Rhoades, 774 N.E.2d at 1048; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468 - 69 (Ind. Tax. Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. Rhoades, 774 N.E.2d at 1050. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC § 6-2.5-3-2(a); USAir, Inc., 623 N.E.2d at 468 - 69. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b) and (c); IC § 6-2.5-3-2(a).

IC § 6-2.5-3-2(c) (retroactive as of January 1, 2010, and applicable to 2013 and 2014) establishes use tax liability of a contractor, as follows:

The use tax is imposed on a contractor's conversion of construction material into real property if that construction material was purchased by the contractor. However, the use tax does not apply to conversions of construction material described in this subsection, if:

- (1) the state gross retail or use tax has been previously imposed on the contractor's acquisition or use of that construction material;
- (2) the person for whom the construction material is being converted could have purchased the material exempt from the state gross retail and use taxes, as evidenced by a properly issued exemption certificate, if that person had directly purchased the construction material from a retail merchant in a retail transaction; or
- (3) the conversion of the construction material into real property is governed by a time and material contract as described in [IC 6-2.5-4-9\(b\)](#).

[45 IAC 2.2-4-21](#) specifically explains issues of a contractor's sales tax or use tax liability when the contractor performs construction work which converts tangible personal property into realty, as follows:

- (a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.
- (b) **All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt** (see 6-2.5-5 [[45 IAC 2.2-5](#)]).

(Emphasis added).

[45 IAC 2.2-4-26](#) further explains in relevant part, as follows:

- (a) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.
- (b) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely [sic] separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sales of materials must be identifiable as a separate transaction from the contract for labor. . . .

See also IC § 6-2.5-1-27.7 (stating that a "[t]ime and material contract" is "a contract in which the cost of construction material and the cost of labor or other charges are stated separately").

Thus, for "lump sum (non-time and materials)" contracts, contractors are responsible for sales tax or use tax on the materials they purchase and use, unless their customers qualify for exemption and provide properly completed exemption certificates at the time of the transactions. Also, contractors are responsible for taxes on their purchases of tools and equipment because they are not materials incorporated into real property; rather, contractors purchase and use those items in performing their work; therefore, as the purchasers and users, they are responsible for the taxes. For sales and use tax purposes, a contractor is "any person engaged in converting construction material into real property on behalf of another person." IC § 6-2.5-1-14.9. "Contractor" may include, "but is not limited to, general or prime contractors, subcontractors, and specialty contractors." *Id.*

Additionally, as a general rule, all sales or purchases of tangible personal property are taxable, unless specifically exempted by statutes or regulations. [45 IAC 2.2-4-21](#)(a). "The conversion of tangible personal property into realty does not relieve a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property." *Id.* An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and [45 IAC 2.2-3-4](#). There are various tax exemptions available outlined in [IC 6-2.5-5](#). A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (internal citations omitted). In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

During the audit, the Department's examiners found that Taxpayer's records showed that Taxpayer purchased materials used in "non-time and material" contract jobs without paying sales tax or use tax or without properly signed exemption certificates to support the purchases. As a result, the audit assessed use tax.

Referencing various websites, Taxpayer claimed that it did not owe any use tax on the materials it purchased because its purchases, including "Solar Energy System and equipment[,]" were Sales Tax Exempt in Indiana [pursuant to] IC § 6-2.5-5-3(b) and IC [§] 6-2.5-3-4(a)." Taxpayer also referred to the Department's Revenue Ruling 2014-03ST (December 5, 2014), 20141231 Ind. Reg. 045140504NRA, claiming that:

It is our understanding that this language related to residential use was added to the Summary after Revenue Ruling #2014-03ST dated December 5, 2014. Prior to this date, this specific language concerning residential customers was not present on this website. Thus, the solar industry in general has interpreted the original language of Indiana ARTICLE 2.2. SALES AND USE TAX to define all solar energy equipment as Sales Tax Exempt as long as "the property is used for the production of tangible personal property, which includes electricity."

Upon review, however, Taxpayer is mistaken. First, as mentioned earlier, Taxpayer is a contractor who specializes in installing solar power panels and equipment for residential and commercial customers. Taxpayer's supporting documentation failed to demonstrate that it is a manufacturer, producing marketable goods for sale. In other words, Taxpayer is not in the business of producing electricity and is not entitled to the manufacturing exemption under IC § 6-2.5-5-3(b). Since Taxpayer did not pay sales tax at the time of its purchase and was not entitled to the manufacturing exemption, its reliance on IC § 6-2.5-3-4(a) is also misplaced.

Second, Taxpayer purportedly asserted that "all solar energy equipment is Sales Tax Exempt as long as 'the property is used for the production of tangible personal property, which includes electricity.'" Taxpayer's "website language" carries no statutory authority regarding the exemption in question. Even if assuming that "the property is used for the production of tangible personal property, which includes electricity," the property used for the production of electricity was owned by its customers, not Taxpayer.

In short, Taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite*, 939 N.E.2d at 1145. Given the totality of the circumstances, without other verifiable supporting documentation, the Department is not able to agree that Taxpayer met its burden. Since sales tax was not paid at the time of purchase, use tax is properly imposed.

FINDING

Taxpayer's protest is respectfully denied.

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